

THE HON'BLE SRI JUSTICE D.S.R. VARMA

AND

THE HON'BLE SRI JUSTICE D. APPA RAO

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WRIT PETITION NO. 12439 OF 2007

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% 27-07-2007

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Between:

KALLAY MUTYALLAMMA

...

Petitioner

And

THE DISTRICT COLLECT, EAST GODAVARI ...

Respondents

AND OTHERS

! COUNSEL FOR THE PETITIONER: Sri C. Praveen Kumar

^ COUNSEL FOR RESPONDENTS: Advocate General

< Gist:

> Head Note:

? CITATIONS:

1. AIR 1987 SC 137
2. 1990 (2) SCC 1
3. AIR 1991 SC 2261
4. (2006) 3 SCC 321

THE HON'BLE SRI JUSTICE D.S.R.VARMA
AND
THE HON'BLE SRI JUSTICE D.APPA RAO

W.P.NO.12439 OF 2007

DATED: 27.07.2007

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Between:

Kalla Mutyalamma

... Petitioner

and

The Collector and District Magistrate,
East Godavari at Kakinada and others

...

Respondents

THE HON'BLE SRI JUSTICE D.S.R.VARMA
AND
THE HON'BLE SRI JUSTICE D.APPA RAO

W.P.NO.12439 OF 2007

ORAL ORDER: (per the Hon'ble Sri Justice D.S.R.Varma)

Heard the learned Assistant Government Pleader, representing the learned Advocate General, appearing for the respondents.

2. The petitioner seeks issuance of writ of Habeas Corpus directing the respondents to produce one Kalla Venkanna, son of Nooka Raju, who is allegedly detained in Central Prison, Rajahmundry, and for a further direction to the respondents to release him forthwith, after declaring that his detention was illegal and void.

3. The facts, in brief, that led to the filing of the writ petition are that five (5) crimes were registered against the alleged detenu for the offences punishable under Section 7 read with Section 8 (b) and 8 (e) of the Andhra Pradesh Prohibition Act, 1995 (for brevity "the Prohibition Act"), which are thus:

1. Cr.No.166/2004-05 dated 20.09.2004 for possessing 3 litres of I.D. liquor.
2. Cr.No.16/2006-07 dated 18.04.2006 for possessing 10 litres of I.D. Liquor.
3. Cr.No.170/2006-07 dated 03.10.2006 for possessing 10 litres of I.D. Liquor.
4. Cr.No.242/2006-07 dated 09.12.2006 registered on the ground that the alleged detenu supplied 150 litres of I.D. Liquor.

5. **Cr.No.285/2006-07 dated 23.10.2006 registered on the ground that he supplied 150 litres of I.D. Liquor.**

(All the above five (5) crimes shall hereinafter be referred to as “item Nos.1, 2, 3, 4 and 5, respectively”.)

4. The samples allegedly involved in the said crimes were also sent to the Chemical Examiner, Prohibition and Excise, Kakinada, who, on analysis, opined that the said samples were illicitly distilled liquor and unfit for human consumption and injurious to health. As and when such crimes were registered, the detenu was obtaining bail from the concerned competent Court. The last order of bail obtained by the alleged detenu was in item No.4, referred to above. In other words, the alleged detenu was already released on bail for the crime said to have been committed in item No.5 and afterwards he was booked for the similar offence mentioned in item No.4 and obtained bail. Accordingly, the bail order obtained by the detenu in item No.4 is the last one and prior to that he was released, of course, by virtue of orders of bail obtained by him.

5. Be that as it may, the respondent No.1-District Collector, exercising his jurisdiction under Section 3 (2) read with Section 3 (1) of The Andhra Pradesh Prevention of Dangerous Activities of Boot Leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (for brevity “the Act”), ordered detention of the alleged detenu, on the ground that he was consistently indulging in bootlegging activities in and around Viravada Village and causing hindrance to public peace and tranquility of that locality and that he was a habitual offender committing offences under the Act. Consequently, the alleged detenu was detained and the said action of the competent authority i.e. the respondent No.1 has been ratified by the Government, through proceedings, dated 04.04.2007, in G.O.Rt.No.1843, General Administration (Law and Order.II) Department It is also not in dispute that the same has been forwarded to the Advisory Board, as envisaged under Section 9 of the Act, for review of the said order of detention, passed by the respondent No.1, for a period of 12 months, which again has been approved by the

Government in G.O.Rt.No.2266, dated 28.04.2007. Hence, the present writ petition.

6. Counter-affidavit has been filed by the respondent No.1- District Collector, denying the material allegations in the writ petition and giving an account of various offences, allegedly committed by the detenu, which have already been referred to in the earlier paragraphs.

7. The main grievance of the petitioner, wife of the alleged detenu, is that the detenu cannot be termed as a 'Boot Legger' and secondly the essential material has not been supplied to the detenu before passing the final orders of detention, invoking the jurisdiction under Section 3 (2) read with Section 3 (1) of the Act and consequently the impugned proceedings of the respondent No.1, dated 30.03.2007, as approved by respondent No.2- Government, in G.O.Rt.No.2266, dated 28.04.2007, are void and illegal.

8. It is further stated in the counter-affidavit that, in the first three crimes, referred to in item Nos.1, 2, and 3, the detenu was found in possession of illicit liquor not fit for human consumption and with regard to item Nos.4 and 5, crimes were registered against the detenu, on the basis of alleged confessional statement made by the alleged accomplices and, therefore, it is stated that the respondent No.1 was totally justified in ordering detention.

9. In view of the relative contentions, on the above factual position, the primary question that falls for consideration before this Court, in the instant case, is whether the respondent No.1 was justified in passing the impugned order of detention of the detenu on the ground that he was a habitual offender in bootlegging.

10. There is no dispute as regards the definition under Section 2 of the Act, which reads thus.

“(b) “boot-legger” means a person, who distils manufactures, stores transports, imports, exports, sells or distributes any liquor, intoxicating drug or other intoxicant in contravention of any of the provisions of the Andhra Pradesh Excise Act, 1968 and the rules, notifications and orders made thereunder, or in contravention of any other law for the time being in force, or who knowingly expends or applies any money or supplies any animal, vehicle, vessel or other conveyance or any receptacle or any other material whatsoever in furtherance or support of the doing of any of the above mentioned things by himself or through any other person, or who abets in any other

manner the doing of any such thing.”

11. In the instant case, if the detenu is found to be involved in such activity, there cannot be any doubt about he being brought within the definition of bootlegger. But, it is to be seen that it is not necessary that cases against such person have got to be established in a Court of law. It is sufficient for the competent authority to identify a person as a bootlegger and satisfies that there is incessant involvement in such activity, could enable him to invoke the jurisdiction under Section 3 of the Act.

12. The next and vital question that falls for consideration is whether various guidelines and prescriptions formulated and made by the apex Court and various High Courts from time to time, have been scrupulously complied with or not?

13. In this context, it is necessary to look into Section 8 of the Act, which reads thus:

“Grounds of order of detention to be disclosed to persons affected by the order. — (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but, not later than five days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.”

14. From the above, it is imperative to take and follow certain amount of care and procedure before passing any order under Section 3 of the Act. The provisions of Section 8 have been elaborated and explained on many occasions by the apex Court and various High Courts.

15. Sri C. Praveen Kumar, learned counsel for the petitioner, places reliance on a decision of the apex Court in

ANANT vs. STATE OF MAHARASHTRA [\[1\]](#).

16. In the above case (1 supra), it appears that, on three occasions, the detenu was allegedly involved in different offences and on all the three occasions he was enlarged on bail. But, the factum of enlargement of the detenu on bail did not find place in

the order of detention, passed by the competent authority, and non-mention of such a vital fact of obtaining bail on all the occasions was considered to be non-application of mind on the part of the detaining authority, while passing the order of detention.

17. In that context, Their Lordships of the apex Court, at paragraph No.6, observed thus:

“In our view this is the short manner in which the two cases can be disposed of. If the petitioner is found disturbing law and order or misusing the bail granted to him, the authorities would be at liberty to move the appropriate Court to get the bail orders cancelled. One does not know how the detaining authority would have acted if he was made aware of the above details.”

18. The abovementioned observations were made in a case that arose under the National Security Act, 1980.

19. In **M. AHAMEDKUTTY vs. UNION OF INDIA** [\[2\]](#), the apex Court, at paragraph No.27, observed thus:

“Considering the facts in the instant case, the bail applications and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu’s right to make an effective representation and that it resulted in violation of Article 22 (5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case.”

20. The above observations were made obviously in the context where the bail applications and the consequential orders of bail were considered to be vital material for consideration and since such material was not mentioned in the order of detention, the same would adversely affect or violate the valuable right of the detenu enshrined under Article 22 (5) of the Constitution of India. The said observations are made in a case that arose under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for brevity ‘the COFEPOSA Act’).

21. In **ABDUL SATHAR IBRAHIM MANIK vs. UNION OF INDIA**

[\[3\]](#), which case also arose under COFEPOSA Act, Their Lordships of the apex Court, having considered various judgments on this subject, have set down the following conclusions:

“(1) A detention order can validly be passed even in the case of a person who is already in custody. In such a case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher Court.

(3) If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody.

(4) Accordingly the non-supply of the copies of bail application or the order refusing bail to the detenu cannot affect the detenu’s right of being afforded a reasonable opportunity guaranteed under Article 22(5) when it is clear that the authority has not relied or referred to the same.

(5) When the detaining authority has merely referred to them in the narration of events and has not relied upon them, failure to supply bail application and order refusing bail will not cause any prejudice to the detenu in making an effective representation. Only when the detaining authority has not only referred to but also relied upon them in arriving at the necessary satisfaction then failure to supply these documents, may, in certain cases depending upon the facts and circumstances amount to violation of Article 22(5) of the Constitution of India. Whether in a given case the detaining authority has casually or passingly referred to these documents or also relied upon them depends upon the facts and the grounds, which aspect can be examined by the Court.

(6) In a case where detenu is released on bail and is at liberty at the time of passing the order of detention, then the detaining authority has to necessarily rely upon them as that would be a vital ground for ordering detention. In such a case the bail application and the order granting bail should necessarily be placed before the authority and the copies should also be supplied to the detenu.” (Emphasis supplied).

22. Further, in the said judgment (3 supra), the contention, raised by either side, that when the orders of bail were not either referred to or relied upon, the non-supply of the same does not affect the detention, was not accepted.

23. From the judgments referred to above (1 to 3 supra), it is clear that it is always not necessary that the detaining authority shall supply the entire material, including the bail applications and the order of bail, and refer the same in the order of detention. In other words, suffice it for the detaining authority to pass the order of detention only on the basis of material on which reliance is placed.

24. If we put it in a different way, if there is no apparent prejudice caused or likely to be caused to the detenu, there is no need for the detaining authority to supply such material on which he is passing the order of detention or referring such material; like the orders of bail in the order of detention.

25. Necessary safeguards have been provided under Section 8 of the Act, as has been elaborated by the apex Court and various High Courts, in different judgments, to protect the valuable right conferred upon the detenu under Article 22 (5) of the Constitution of India.

26. However, keeping those safeguards in mind and also the powers conferred on the detaining authority, to the extent possible, the detenu shall be well informed about the entire relevant material on record, including the fact of bail applications and the orders of bail obtained.

27. In other words, if the interpretation that no material need be supplied or be referred to in the order of detention is to be accepted, the same is likely to lead to arbitrary exercise of jurisdiction conferred under Section 3 of the Act. Hence, priority should be given to safeguard the interest of the detenu.

28. The learned Assistant Government Pleader, representing the learned Advocate General, appearing for the respondents, places reliance on a decision of the apex Court in **SUNILA JAIN vs. UNION OF INDIA**^[4], wherein the subject matter arose under COFEPOSA Act.

29. In **SUNILA JAIN's** case (4 supra), Their Lordships of the

apex Court, having considered the aspect of the offences as to whether they are bailable or not, observed thus;

“The question as to whether an offence is bailable or not is not a vital fact whereupon an order of bail can be passed. **Application of mind to the averments made in a bail application may be relevant where the grounds stated therein reveal certain facts which are vital for passing an order of detention. In a case of such nature, it may be said that the application for bail was necessary to be placed before the detaining authority and non-furnishing a copy thereof to the detenu would vitiate the order of detention**” (emphasis supplied).

30. The further observations of Their Lordships are thus:

“The Constitutional mandate can be said to be violated, provided:

1. **the impairment has been caused to the subjective satisfaction to be arrived at by the detaining authority; and**
2. **if relevant facts had not been considered or the relevant or vital documents have not been placed before the detaining authority.”**

31. However, in the said case, except the contention that the offence was bailable in nature, no other contention was brought to the notice of the detaining authority that the order of detention had taken note of the fact that the detenu had already been released on bail and that it was also not in dispute that a copy of the order of granting bail and order of remand had been furnished to the detenu.

32. Under the above circumstances, Their Lordships observed that non-furnishing of a copy of application for bail cannot be said to be a ground, which impaired the subjective satisfaction of the detaining authority or the same was a relevant fact, which was required to be taken into consideration by him, and the application for bail was required to be supplied to the detenu.

33. Further, the most important observation in the said judgment is to the effect that all the documents placed before the detaining authority are not required to be supplied; only relevant and vital documents are required to be supplied.

34. Now, the incidental question that arises for consideration, in the instant case, is whether non-reference of the factum of bail granted in favour of the detenu, by the competent Court, is vital component in favour of the detenu or not?

35. In this context, it is necessary to fall back upon the

facts of the case, at the cost of repetition.

36. From a perusal of the impugned order, passed by the respondent No.1, it appears that in item Nos.1, 2, 3 and 5, bail was obtained by the detenu. Item No.4 is the last crime registered against the detenu, in which case also he obtained bail, which fact is not in dispute. When the detaining authority had made a specific mention of the orders of bail in all the earlier crimes, the non-mentioning of the order of bail obtained by the detenu would be, in our considered view, a vital fact, which is capable of ***impairing the subjective satisfaction of the detaining authority***.

37. In other words, when the detaining authority was made available with the entire material, including the bail applications and orders of bail, passed by the competent Court, it is for sure that the detaining authority had knowledge of all the events. If that be the case, there is no necessity for the detaining authority to make a reference of the bail orders passed in item Nos.1, 2, 3 and 5, but non-mentioning of bail order in item No.4, which actually is the last incident, prompting the detaining authority, to pass the impugned order, would amount to arbitrariness and non-application of mind.

38. The orders of bail, which are on record, in this case, cannot partially be treated as 'vital' and partially as 'non-vital'. If there are uniform orders of bail obtained by the detenu, in all the cases, such material shall have to be made available to the detaining authority and, in turn, the detaining authority is under an obligation to uniformly make reference of all the facts, including the orders of bail. Referring to some and failing to refer some would, in our considered view, amount to non-application of mind on the part of the detaining authority.

39. As already noticed, it is always not necessary for the detaining authority to supply the entire material and make a reference of all the bail orders either, if he really is not relying on such material for passing the impugned order. When a partial reference has been made to some material and some has been omitted, the mind of the detaining authority shall be capable of being perceived that the authority has not been relying on other material or that the authority is under clear impression that such

material is ineffective or the authority is of the opinion that the case can be made out in spite of the absence of or reference of such material before him in the order of detention. Suffice it for the detaining authority to put on record the reason, in this regard.

40. For the aforementioned reasons and also having regard to the propositions laid down by the apex Court, referred to supra, we are of the considered view that the factum of obtaining bail is a vital fact, particularly when other bail orders were specifically mentioned. We do not find any plausible reason for the detaining authority to omit the factum of obtaining bail on the last occasion, in item No.4, and the detenu was moving freely, which, in our view, would certainly ***impair the subjective satisfaction of the detaining authority*** and consequently vitiate the entire proceedings.

41. In the result, the impugned order, dated 30.03.2007, passed by the respondent No.1-District Collector, East Godavari at Kakinada, and the consequential order, passed by the respondent No.2-Government of Andhra Pradesh, through G.O.Rt.No.2266, General Administration (Law and Order-II) Department, dated 28.04.2007, confirming the impugned order, are hereby quashed.

42. Accordingly, the writ petition is allowed, and the detenu shall be released forthwith, if not required in any offence.

JUSTICE D.S.R.VARMA

JUSTICE D.APPA RAO

Date: 27.07.2007

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- [\[1\]](#) . AIR 1987 SC 137
- [\[2\]](#) . 1990 (2) SCC 1
- [\[3\]](#) . AIR 1991 SC 2261
- [\[4\]](#) . (2006) 3 SCC 321